Supreme Court, U.S.
FILED

No. _____

09-917 JAN 28 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

NARDINO COLOTTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD WARE LEVITT
Counsel of Record
LEVITT & KAIZER
40 Fulton Street, 23rd Floor
New York, New York 10038
(212) 480-4000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether the Second Circuit wrongly found that the admission of a non-testifying co-defendant's lengthy, detailed and inculpatory pre-arrest statements to the FBI, in which "we" and "other members of the organization" were substituted for co-defendants' names (including Petitioner's), did not violate *Bruton* (the issue left open by this Court in *Richardson v. Marsh*, 481 U.S. 200, 211 n.5 (1987)).

(2) Whether the Second Circuit wrongly found that the district court's refusal to personally, individually *voir dire* a juror whose openly hostile comments and behavior indicated that he was deliberating prematurely and could not be impartial, was not an abuse of discretion.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Nardino Colotti, co-defendants Prenka Ivezaj, Alex Rudaj, Angelo DiPietro, Nikola Dedaj and Ljusa Nuculovic, and the Respondent United States of America.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT 2

A. Introduction 2

B. Summary of Facts 4

REASONS FOR GRANTING THE WRIT 6

Point One

THIS COURT SHOULD GRANT MR. COLOTTI'S PETITION FOR A WRIT OF CERTIORARI TO ADDRESS THE QUESTION LEFT UNANSWERED IN *RICHARDSON v. MARSH*, NAMELY, WHETHER A STATEMENT THAT WOULD OTHERWISE VIOLATE *BRUTON* IS ADMISSIBLE AT A JOINT TRIAL IF PRONOUNS ARE SUBSTITUTED FOR A DEFENDANT'S NAME IN THE OUT-OF-COURT INCULPATORY STATEMENT OF A NON-TESTIFYING CO-DEFENDANT 6

TABLE OF CONTENTS – Continued

Page

A. The Statements of Co-Defendant Nuculovic to the FBI 7

B. The Admission of Nuculovic's Statements with a Limiting Instruction, When the Redactions Failed to Completely Eliminate any References to the Defendants and Clearly Implicated Them, Violated the Confrontation Clause 11

Point Two

THIS COURT SHOULD GRANT MR. COLOTTI'S PETITION FOR A WRIT OF CERTIORARI TO CLARIFY THAT THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY AT A MINIMUM REQUIRES THAT THE TRIAL COURT ADEQUATELY PROBE A JUROR WHO AT ANY STAGE OF THE TRIAL MAKES STATEMENTS OR EXHIBITS BEHAVIOR THAT EVINCES AN INABILITY TO JUDGE THE CASE IMPARTIALLY OR REFLECTS PREMATURE DELIBERATIONS, IN VIOLATION OF THE JUROR'S OATH 16

A. The Court's Refusal to Conduct Individual Questioning of Juror Four 17

B. Mr. Colotti was Deprived of his Sixth Amendment Right to an Impartial Jury ... 22

CONCLUSION 28

TABLE OF CONTENTS – Continued

Page

APPENDIX

U.S. Court of Appeals' Opinion ..... App. 1

U.S. Court of Appeals' Summary Order ..... App. 26

U.S. Court of Appeals' Judgment ..... App. 34

U.S. Court of Appeals' Order Denying Rehearing ..... App. 36

TABLE OF AUTHORITIES

Page

CASES

Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968) ..... *passim*

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) 7

Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998) 12, 13, 14

Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848 (1973) 23

Irwin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) 22, 23

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791 (1976) 16, 23, 24, 25

Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468 (1966) 22

Reynolds v. United States, 98 U.S. 145 (1878) 22

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987) ..... *passim*

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453 (1983) 26

Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982) 22, 23

United States v. Hardwick, 544 F.3d 565 (3d Cir. 2008) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Ivezaj [*Colotti*], 2009 WL 1636018 (2d Cir. 2009) 1

United States v. Ivezaj [*Colotti*], 568 F.3d 88 (2d Cir. 2009) 1

United States v. Jass, 569 F.3d 47 (2d Cir. 2009) 12

United States v. Peterson, 385 F.3d 127 (2d Cir. 2004) 27

United States v. Resko, 3 F.3d 684 (2d Cir. 1993) 25

United States v. Richards, 241 F.3d 335 (3d Cir. 2001) 12

STATUTES

18 U.S.C. § 924(c) 5, 14

28 U.S.C. § 1254(1) 2

PETITION FOR A WRIT OF CERTIORARI

Nardino Colotti respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. Ivezaj* [*Colotti*], part of which is by formal decision and part of which is by summary order, is at 568 F.3d 88 (2d Cir. 2009) and 2009 WL 1636018 (2d Cir. 2009) (*see* Pet. App. 1).[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 11, 2009 (Pet. App. 8). Mr. Colotti's Petition for Rehearing was denied on August 31, 2009 (Pet. App. 7). This petition is timely filed within the 90-day statutory time limitation and extensions granted on October 14 and December 16, 2009. This Court has jurisdiction to

[1] Numbers in parentheses preceded by "Pet. App." refer to the Appendix to this Petition.

review the judgment below on a writ of certiorari pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION – AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

A. Introduction

Mr. Colotti seeks a petition for a writ of certiorari on two grounds discussed herein and joins in the petitions being filed by his co-defendants in this case.[2]

[2] Mr. Colotti respectfully joins in the issues and arguments, not inconsistent with those raised herein, raised in the petitions for writs of certiorari being submitted to this Court by his co-defendants.

First, we respectfully submit that the Second Circuit wrongly found that the admission of a non-testifying co-defendant's lengthy, detailed and inculpatory pre-arrest statements to the FBI, in which "we" and "other members of the organization" were substituted for co-defendants' names, did not violate *Bruton*. Twenty years after this Court held in *Bruton v. United States* that "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant," are admitted at a joint trial, courts "cannot accept limiting instructions as an adequate substitute for [the defendant's] constitutional right of cross-examination," 391 U.S. 123, 135-37, 88 S.Ct. 1620 (1968), this Court decided in *Richardson v. Marsh* that the admission of such a statement with a limiting instruction does not violate the Confrontation Clause if "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. 200, 211, 107 S.Ct. 1702 (1987). At that time, the Court left unanswered the question presented in this Petition for review, saying, "[w]e express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." 481 U.S. at 211, n.5. The Circuits have ruled inconsistently on this issue, making it ripe for this Court's review.

The second ground on which Mr. Colotti seeks certiorari is that the Second Circuit wrongly found that the district court's refusal to personally, individually *voir dire* a juror whose openly hostile

comments and behavior indicated that he was deliberating prematurely and could not be impartial, was not an abuse of discretion. While great deference is accorded a trial judge in fashioning a remedy for juror misconduct, a defendant's Sixth Amendment right to an impartial jury is reduced to an empty promise when the trial judge fails to at least question a juror who has repeatedly and stridently vocalized his personal views regarding counsel and the defendants' guilt, in violation of his oath. We respectfully submit that this case presents an opportunity for the Court to give further guidance on circumstances under which the protection of a defendant's Sixth Amendment right to an impartial jury requires trial court to, minimally, make an inquiry of a juror who may be unable to be impartial.

B. Summary of Facts

The specific facts pertaining to each issue are discussed fully under the relevant point heading below. Generally, Mr. Colotti and co-defendants Prenka Ivezaj, Alex Rudaj, Angelo DiPietro, Nikola Dedaj and Ljusa Nuculovic, were charged in a 21-count indictment, with racketeering, racketeering conspiracy, illegal gambling activities and related charges, as members of the so-called "Rudaj Organization," a criminal enterprise alleged to have forcibly seized control of illegal gambling in parts of the Bronx, Queens and Westchester County, New York from established Italian organized crime families. The existence of the Rudaj racketeering enterprise was hotly

disputed, although the defendants conceded some involvement in illegal gambling.

Count One, charging a substantive RICO violation, alleged that from the early 1990s until October 2004, the "Rudaj Organization" engaged in a pattern of racketeering, consisting primarily of the extortions or attempted extortions of various owners of clubs and illegal gambling establishments. Count Two charged a RICO conspiracy, and the remaining 19 counts of the indictment charged substantive counts of assault in aid of racketeering, illegal gambling conspiracy, illegal gambling business, extortionate debt collection, extortion conspiracy, attempted extortion, conspiracy to use extortionate means to collect an extension of credit, loan sharking, use and carrying of a firearm and bank fraud. With respect to Count Thirteen which charged Mr. Colotti with use and possession of a firearm [18 U.S.C. § 924(c)], the district court issued an order, and instructed the jury, that in order for it to convict Mr. Colotti of Count Thirteen it would have to find that he "knowingly used or carried a firearm during and in relation to the crime" charges in Racketeering Act Five, the "Soccer Fever" incident (discussed further *post* at 7-10) (CIA-540, 555-58).[3]

---

[3] Numbers in parentheses preceded by "CIA" refer to the Colotti-Ivezaj joint appendix filed in the Second Circuit. Those preceded by "TR" refer to the trial transcript.

The jury convicted Mr. Colotti of Count One, finding Racketeering Act Five (the "Soccer Fever" incident) as well as Racketeering Acts Three, Nine and Twelve, proven, and convicted him as well of Counts Two, Three, Five, Six, Nine, Ten, Twelve and Thirteen (use and carrying of firearm) (CIA-703-09). Mr. Colotti was found not guilty of Count Four (assault of Mikhail Hirakis during the "Soccer Fever" incident) (CIA-707). Mr. Colotti was sentenced to a total term of 324 months' imprisonment, consisting of concurrent terms of 240 months on Counts One, Two, Three, Nine, Ten and Twelve and 60 months on Counts Five and Six, and a (mandatory) consecutive term of 84 months on Count Thirteen (CIA-906-07).

REASONS FOR GRANTING THE WRIT

Point One

THIS COURT SHOULD GRANT MR. COLOTTI'S PETITION FOR A WRIT OF CERTIORARI TO ADDRESS THE QUESTION LEFT UNANSWERED IN *RICHARDSON v. MARSH*, NAMELY, WHETHER A STATEMENT THAT WOULD OTHERWISE VIOLATE *BRUTON* IS ADMISSIBLE AT A JOINT TRIAL IF PRONOUNS ARE SUBSTITUTED FOR A DEFENDANT'S NAME IN THE OUT-OF-COURT INCULPATORY STATEMENT OF A NON-TESTIFYING CO-DEFENDANT

The trial court admitted co-defendant Nuculovic's damning statement that "he and other members of

his organization went to Soccer Fever" and that "we all had guns", finding that the substitutions "we" and "other members of the organization" for the names of the co-defendants sufficiently protected their identities such that its admission did not violate their rights under the Confrontation Clause. The judge sought to further remedy the admission of the statement with a limiting instruction that the statement applied only to Nuculovic. Contrary to the circuit court's finding, the redacted confession here falls squarely within *Bruton*'s scope since it failed to entirely eliminate any reference to Mr. Colotti's existence and the jury would readily connect the incriminating conduct described by Nuculovic to Mr. Colotti and the other defendants on trial with him. Its prejudice, therefore, was not cured by the court's limiting instruction.

A. The Statements of Co-Defendant Nuculovic to the FBI

The district court permitted the government to introduce Nuculovic's statements through FBI Agent Rico Falsone, denying defense motions for severance from Nuculovic or preclusion of the statements on the grounds that introduction of the statements would violate (1) *Bruton v. United States*, 391 U.S. 123 (1968) and (2) the Confrontation Clause, *citing Crawford v. Washington*, 541 U.S. 36 (2004). The government proposed redactions of the statements and a limiting instruction, which the defense maintained were insufficient. Defense counsel specifically noted that

the statements "we all had guns" related to members of the "organization," which could only have referred to the defendants on trial (CIA-158-59). The court approved the proposed redactions, concluding that there was no *Bruton* violation because "[t]here has to be substantial independent evidence in order for the jury to have any understanding whatsoever as to what the content of the word 'we' might mean" (CIA-159). By contrast, the Court precluded testimony regarding Nuculovic's use of the word "three" in referring to the leaders of the organization, finding that it would effectively identify defendants Colotti, Rudaj and Dedaj and, therefore, violate *Bruton* (CIA-375). At the start of Agent Falsone's testimony, the court instructed the jury that his testimony should be considered only against defendant Nuculovic (Tr. 8653-54).

Agent Falsone testified that over the course of three interviews in September 2004, Nuculovic told FBI agents of his involvement during the previous four years with "the Albanians" – a criminal organization that the government alleged was run by Mssrs. Colotti, Rudaj and Dedaj – its history, its violent takeover of gambling in Astoria Queens from the Lucchese crime family, and its violent confrontations with various other organized crime families, including incidents at the gambling clubs Soccer Fever and Skutarija (CIA-788a-788i). Agent Falsone described an interview in which Nuculovic discussed an incident at Soccer Fever (a gambling club that had just been opened by an associate of the Gambino crime

family) in which the defendants allegedly entered the club with guns and shut it down, testifying in pertinent part:

> Q: What did he tell you?
>
> A: Mr. Nuculovic stated that in response to the opening of Soccer Fever, that he and other members of his organization went to Soccer Fever on the first or second day it was open to shut it down. And one other reason, they went there also to beat up Tommy Napoli.
>
> Q: Now, did you ask Mr. Nuculovic if any of the people he was with brought firearms when they went to Soccer Fever?
>
> A: Yes, I did.
>
> Q: What was Mr. Nuculovic's response?
>
> A: His exact response to that question, his exact words were, "we all had guns."

(Tr. 8676-78).

Falsone testified, over objection (*and contrary to the court's explicit instruction not to elicit the "three leaders" references*) that Nuculovic said "he and the *three leaders* of the organization took over the gambling clubs and the gambling activities from the Lucchese crime family . . . " (Tr. 8660, emphasis added). Nuculovic also "stated one of the leaders of the organization thought that the organization was growing such that they were creating a sixth family." (Tr. 8661). When asked whether Nuculovic had

explained "anything about the actual takeover of territory in Astoria?" Agent Falsone responded, "He told me that himself, along with the *three leaders* of the organization." (CIA-387-88, emphasis added).

At this point in the testimony, the court recessed and addressed counsel outside the jury's presence. The court reiterated it had forbidden reference to "three leaders" and invited comment (Tr. 8663). Counsel for Rudaj, Colotti and Dedaj each moved for a mistrial (Tr. 8663-64, 8667). The court denied the mistrial motion, saying it would permit counsel to make any further record at the end of the day (Tr. 8667). The defense did not want the court at this point to strike, and thereby highlight, the testimony in front of the jury (Tr. 8667, 8688). Agent Falsone resumed his testimony, describing Nuculovic's extensive statements about the organization overall and specific events charged in the indictment, including the Soccer Fever incident.

After the court excused the jury for the day, defense counsel renewed their motions for a mistrial, arguing that the introduction of Nuculovic's statement at a joint trial denied the defendants a fair trial and violated *Bruton* (Tr. 8688-89).

The court denied the motion for a mistrial, but offered to strike the "three leaders" testimony and instruct the jury to disregard it (Tr. 8697). It said that its order deleting the "three leaders" reference was a discretionary one and had not been legally mandated since the jury would have to use a "significant

amount of independent evidence to reach any conclusion whatsoever" regarding the identity of the "three leaders" (Tr. 8701).

The following day, counsel for Mr. Colotti asked the court to strike the "three leaders" testimony from the record so it would not be available during deliberations, but that the court not do so in front of the jury, in order not to highlight the testimony further (Tr. 8737-38). The court agreed to strike the "three leaders" testimony from the record (Tr. 8738).

B. The Admission of Nuculovic's Statements with a Limiting Instruction, When the Redactions Failed to Completely Eliminate any References to the Defendants and Clearly Implicated Them, Violated the Confrontation Clause

"[W]here the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant," are admitted at a joint trial, courts "cannot accept limiting instructions as an adequate substitute for [the defendant's] constitutional right of cross-examination." *Bruton v. United States*, 391 U.S. 123, 135-37, 88 S.Ct. 1620 (1968). In *Richardson v. Marsh*, this Court clarified the *Bruton* protection, holding "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction *when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.*" 481 U.S.

200, 211, 107 S.Ct. 1702 (1987) (emphasis supplied). Only then can a court's curative instruction limiting the confession's application to the co-defendant who made it be presumed to have been followed.

Richardson did not decide the admissibility of a confession "in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5. Although this Court subsequently held redactions that replace a name with an obvious blank space or the word "deleted" or the like are anathema, as they refer to the "existence of the nonconfessing defendant[,]" *Gray v. Maryland*, 523 U.S. 185, 192, 118 S.Ct. 1151 (1998), the question of whether substitutions of names with pronouns or other references is appropriate has yet to be decided by this Court. *Gray* took issue with redactions that leave "inferences that a jury ordinarily could make immediately, even were the confession the very the first item introduced at trial."

Gray and *Richardson* have been interpreted by the circuit courts with mixed results. For example, two Third Circuit cases, *United States v. Hardwick*, 544 F.3d 565, 573 (3d Cir. 2008) (statement redacted to replace references to two co-defendants with the terms "others" or "another person" violated their rights under the Confrontation Clause); *United States v. Richards*, 241 F.3d 335 (3d Cir. 2001) (statement redacted to replace co-defendant's name with "friend" violated Confrontation Clause), are directly at odds with the Second Circuit's analysis in the present case and others, *see, e.g., United States v. Jass*, 569 F.3d 47

(2d Cir. 2009) (statement redacted to replace reference to co-defendant with "another person" did not violate Confrontation Clause).

Here, the reactions were inadequate to guarantee that the jury could follow the court's instructions to apply the statement only to Nuculovic. Indeed, the mental gymnastics that the court presumed the jurors could perform were nothing short of Olympian. Nuculovic admitted he was a member of the charged RICO enterprise, described its structure, including the existence of "three leaders," and explained in detail how the organization took over the "barbut" gambling business in Astoria Queens. In his description of the organization's activities, Nuculovic descended from the general to the specific, describing the criminal conduct that was charged in several of the racketeering acts and counts, including the use of guns during the Soccer Fever and other incidents. The jury could not help but conclude that the statements "we all had guns" and "other members of the organization" referred to Mr. Colotti and the other defendants in light of previous evidence that the defendants were leaders of the charged RICO enterprise and that they were among the people who entered and shut down Soccer Fever. The redactions might as well have been the incriminating "blank spaces" or "deleted" for all the effect they had in hiding the identity of the other participants. *Gray, supra*, 523 U.S. at 192. Contrary to the finding of the Second Circuit, the fact that the jury might only infer the "we" referred to Mr. Colotti and the other

defendants because of the previously admitted evidence "cannot make the critical difference." *Id.* at 195. No one other than the defendants on trial could have been implicated by the Nuculovic statements.

Even more directly incriminating was Nuculovic's "three leader's statement" which dovetailed with the government's repeated assertion that the three leaders of the organization were defendants Colotti, Rudaj and Dedaj.

The Nuculovic statement was not harmless as to Mr. Colotti, at least with respect to the consecutive eighty-four month sentence imposed on Mr. Colotti upon his conviction under Count Thirteen, which charged a violation of 18 U.S.C. § 924(c) (use and carrying of a firearm). As the court made clear, the jury could convict under Count Thirteen only if it also found that the Soccer Fever extortion conspiracy charged in Racketeering Act Five was proved (CIA-455-57). Thus, Nuculovic's statement, "we all had guns" was crucial to Mr. Colotti's conviction of the § 924(c) violation charged in Count Thirteen. Further, only Nuculovic made explicit, detailed statements to the FBI regarding the Soccer Fever event, explaining, among other things, "We all had guns," because "you couldn't do something like that against the Gambino crime family without guns" (Tr. 8678). The government highlighted this statement during summations, reminding the jury (even while acknowledging that Nuculovic's statement was admissible only against him), "You also know that Nuculovic went to Soccer

Fever that night armed because he told Agent Falsone, we all had guns" (Tr. 9312).

Nuculovic's statements were the government's strongest evidence regarding the Soccer Fever incident. The only other witness to testify substantially about the Soccer Fever incident, Mikhail Hirakis, could not, and in fact did not, carry the day for the government. Hirakis' claim that he was pistol whipped during the Soccer Fever incident was soundly refuted by expert medical testimony, and the jury ultimately rejected his testimony, finding Mr. Colotti and his co-defendants not guilty of Count Four, which charged them with assaulting Hirakis.

This Court should, accordingly, grant Mr. Colotti's petition for a writ of certiorari to determine whether the redaction of non-testifying co-defendant Nuculovic's statements to the FBI were simply too transparent for the jury not to have deduced that Nuculovic implicated Mr. Colotti and his co-defendants, and the admission of his statements therefore violated Mr. Colotti's rights under the Confrontation Clause.

Point Two

THIS COURT SHOULD GRANT MR. COLOTTI'S PETITION FOR A WRIT OF CERTIORARI TO CLARIFY THAT THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY AT A MINIMUM REQUIRES THAT THE TRIAL COURT ADEQUATELY PROBE A JUROR WHO AT ANY STAGE OF THE TRIAL MAKES STATEMENTS OR EXHIBITS BEHAVIOR THAT EVINCES AN INABILITY TO JUDGE THE CASE IMPARTIALLY OR REFLECTS PREMATURE DELIBERATIONS, IN VIOLATION OF THE JUROR'S OATH

This Court has held that the Sixth Amendment requires that, at a minimum, a trial court should adequately probe potential jurors during *voir dire* to determine the existence of juror bias or impartiality in a case that carries the potential for such bias or impartiality, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601-02, 96 S.Ct. 2791, 2823-24 (1976), and it should also instruct them not to engage in premature deliberations. Certainly, therefore, when confronted with evidence of a specific juror's actual partiality or conduct suggesting prejudging the case, the Sixth Amendment requires that the court do more than what the trial court did here, *i.e.*, merely give the jury as a whole a generalized instruction to reserve judgment until deliberations.

At the least, the court should have questioned the juror individually to ascertain his frame of mind

and whether he could judge the case impartially and without bias and not rush to judgment. The Second Circuit ignored this principal and wrongly found that the district court did not abuse its discretion in refusing to individually *voir dire* the juror. This Court should grant certiorari to clarify that the right to a fair trial by an impartial jury of one's peers requires a district court to, at a minimum, make an inquiry of the juror when confronted with evidence that a juror may be biased and unable to judge the case impartially.

A. The Court's Refusal to Conduct Individual Questioning of Juror Four

Juror Four of the anonymous jury in this case first came to the attention of the court and parties when, on the morning of the third day of trial testimony, he submitted to the court a typewritten note that he had prepared over the weekend, asking about the reason and necessity for the court-imposed restrictions on the jurors' travel to and from the courtroom, and whether it was "for security reasons" or to ensure that the jurors arrived in court on time (Tr. 604; CIA-198-99).

After about a week of testimony, on October 25, 2005, defense counsel brought to the court's attention their observations of troubling behavior by Juror Four, who was making "audible comments," including answering a question for witness Misale (CIA-225). After brief further discussion, the court said it would

think about how to address the matter and was open to counsel's suggestions (CIA-227-28). It was agreed on the following day that it was best to say nothing to the juror or the jury about the matter at that point (CIA-231).

Six days later, during the testimony of government witness Gaetano Peduto, defense counsel brought the juror's continued audible comments to the court's attention, noting that the juror – to the apparent dismay of Juror Five – continued to answer questions for witnesses, "directed one of the lawyers to 'stop talking,'" and was giving directions to younger jurors around him (CIA-234).

The issue of the behavior of Juror Four arose again during the cross-examination of another government witness. One defense counsel, in what he called Juror Four's most "gross" and "blatant" display, observed the juror slumping in his seat as a co-counsel's cross-examination of the witness began, turning in his chair and raising his shoulders in a shrugging motion after the attorney's second question, and turning around and pointing to the juror behind him then pointing to the ceiling and shrugging his shoulders "with a disgusted look on his face" after co-counsel's next question (CIA-272). Counsel voiced concern that the juror was growing bolder in his anti-defense behavior since no action had been taken in response to his past behavior (CIA-273). According to the government, the juror's body language was not inappropriate and he was slumped in

his chair and looking at the ceiling for parts of both the direct and cross-examinations (CIA-273-74).

The court suggested that the jurors be given a general instruction to keep an open mind and not make comments, telling counsel to think about it overnight. Defense counsel, however, decided to "just leave it alone" at that time (Tr. 4983, 5002). The court later noted that in her observations of Juror Four during that day, she saw nothing "untoward" (Tr. 5164-65).

Over a week later, during the testimony of another government witness, defense counsel moved to discharge Juror Four and question Jurors Three, Four and Five (CIA-316-17). During cross-examination, defense counsel observed various behaviors on the part of Jurors Four and Five, including hearing Juror Four state, "Jesus what a waste of time" and sink his head into his hands, while Juror Five shook her head, and later hearing Juror Four say, "oh shut up" and "that's just stupid," while Juror Five again shook her head and "looked appalled" (CIA-316). Counsel further noted that Juror Four consistently made noises and "did that thing with his mouth" over the past week, and that Juror Five sometimes nudged him as if to tell him "knock it off" (CIA-317). Counsel opined Juror Four had made up his mind and was "poison" to the other jurors (CIA-317). The court denied the motion and instead instructed the jury, "do not discuss the case;" "be careful not to do anything that might express an opinion out

loud;" and "keep an open mind throughout the entire process" (CIA-318-19).

The court subsequently stated that it had denied counsels' motion to discharge or question the jurors because it believed that the jurors were having normal reactions to the length of the trial and some of the cross-examinations of witnesses (CIA-321). Defense counsel voiced a continuing objection to the court's ruling, arguing that Juror Four should be removed because he had gone beyond normal human reaction to improperly expressing his opinion, and that Juror Five was reacting to Juror Four in some way, and should be questioned by the court about her reaction (CIA-322-23). Counsel observed that Juror Four was expressing "his opinion about the questions of some counsel. He shouts out answers . . . [H]e is so aggressive with his opinion and he's so interested in making sure everyone else hears his opinion . . . [H]e is poisoning the jury . . . " (CIA-323-324).

Counsel argued that the court's instruction was not sufficient to address the problem (CIA-324). The court stated that it heard the juror's comment and also observed the "exasperation" of other jurors about the length of cross-examinations, but opined that these were "natural human reaction[s]." The court stated, however, "I totally agree with counsel that it is important that they not present or discuss their opinions to each other and that they keep an open mind. I'll consider whether anything further needs to be said" (CIA-324).

During the summations of two of the defendants' counsel, Juror Four commented, "50 to life" (CIA-467-68). Counsel asked that the court question the juror to ascertain what he meant by the comment or discharge him (CIA-467-69).

The court opined that at this point in the trial, as the jurors had heard all of the evidence and probably formed some opinion, the question was whether they could listen fairly to the remaining summations and the court's charge: "My concern is about whether someone has formed an impression at this point in the trial such that they will be closed-minded and not listen carefully to the charge" (CIA-472). The court indicated that it did not want to question the juror separately because the juror might feel singled out and focus on that rather than the charge and the evidence (CIA-473).

During a break in the government's rebuttal summation, counsel argued that no option other than questioning the juror was sufficient because the juror was "telegraphing" his feelings and opinions to the rest of the jury, appeared to be "well into deliberations and trying to recruit others by verbalizing his feelings," and would not be affected by any general instruction the court could give since its previous instructions had had no effect on him (CIA-480). Counsel urged the court to either question the juror individually or, at least, remind the jurors of their oaths to keep open minds (CIA-479-81).

The court refused to take either course of action, reiterating that the risks of questioning the juror individually outweighed any benefits and stating that, "based on everything I have heard here, I am not going to do an inquiry of the jury at the end of the day" (Tr. 9834-35).

B. Mr. Colotti was Deprived of his Sixth Amendment Right to an Impartial Jury

The Sixth Amendment guarantees Mr. Colotti the right to a trial by an impartial jury. U.S. Constitution, Amends. VI, XIV; *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468 (1966). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irwin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961). "In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.'" *Id.*, 366 U.S. at 722, 81 S.Ct. at 1642. "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155 (1878); *Irvin, supra*, 366 U.S. at 722 (*quoting Reynolds*).

In *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982), Justice Marshall (dissenting in court's denial of certiorari) observed that this Court has "time and time again, in a broad variety of contexts" "adopted

strong measures to protect the right to trial by an impartial jury." These have included "insist[ing] that the defendants be given a fair and meaningful opportunity during *voir dire* to determine whether prospective jurors are biased – even if they have no specific prior knowledge of bias" (*citing Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848 (1973)), assuring that jurors are drawn from a broad cross-section of the community, "protect[ing] defendants from the possibility that jurors might be prejudiced by excessive pretrial publicity" (*citing Irwin, supra*, 366 U.S. 717, 81 S.Ct. 1639), and "guard[ing] against other conduct by third parties that might affect the jury's impartiality." *Id.* at 225-28, 950-52. "To summarize", Justice Marshall stated:

> [T]he Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial.

455 U.S. at 228, 102 S.Ct. at 952.

This Court has yet to address the issue presented for review, even though it comes up repeatedly in the district and circuit courts. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601-02, 96 S.Ct. 2791, 2823-24 (1976), however, is instructive. In *Nebraska Press,* in

which the issue was whether a prior restraint on the press was necessary to guarantee the defendant a fair trial by an unbiased, impartial jury, this Court noted the measures that a trial court should take to ensure the impartiality of an impaneled jury faced with a highly publicized case:

> Initially, it is important to note that once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings. Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press. But even if the press nevertheless obtains potentially prejudicial information and decides to publish that information, the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the *voir dire* to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt.

427 U.S. at 601-02, 96 S.Ct. at 2823 (footnotes omitted).

The Court goes on to state that

> it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information.

Id.

Like juror exposure to pretrial publicity, premature deliberations by jurors can also result in their forming a bias against the defendant before all the evidence has been heard. In recognition of this, the prohibition against jurors prematurely discussing a case is "now firmly established in practice in federal court as well as in most, if not all, state courts." *United States v. Resko*, 3 F.3d 684, 689-90 (2d Cir. 1993) ("premature discussions are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason."). This Court's decisions suggest that the appropriate response of the court confronted with this, as with other forms of potential taint of the jury, is to directly address it by making an inquiry of the juror and, if necessary, other jurors who may have been infected.

Yet here, despite the juror's bizarre behavior and often openly hostile attitude towards the defense, the court refused to make any individualized inquiry either of the juror himself or other jurors. The record

demonstrates that Juror Four was engaging in premature deliberations and other misconduct and in fact was doing so – at the very least – in open court. He suggested an answer to a witness (Tr. 3010); ordered a defense attorney to "stop talking" (Tr. 3581); made odd and disparaging gestures during a defense counsel's cross-examination (Tr. 4973-74); exclaimed "Jesus what a waste of time," "Oh shut up," and "that's just stupid" during defense cross-examination (Tr. 6129); and exclaimed during summations, "50 to life" (Tr. 9753-54). Further, he appeared to be infecting other jurors.

This Court has held that "[t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred." *Rushen v. Spain*, 464 U.S. 114, 119-20, 104 S.Ct. 453, 456 (1983). Here, the trial court's "remedy" of instructing the jury "do not discuss the case;" "be careful not to do anything that might express an opinion out loud;" and "keep an open mind throughout the entire process" (CIA-318-19) did not mitigate the problem – the juror continued to make comments after the court's instructions. Still the court took no actions despite counsel's repeated objections and entreaties to either question or discharge the juror.

The court's response was inadequate because it did not ascertain whether Juror Four had prematurely formed a view of the defendants' guilt and was therefore unable to be impartial; whether other jurors were influenced by the juror's comments; or whether other such behavior on the part of the juror

had occurred in the jury room or elsewhere. Indeed, the possibility that Juror Four had been making additional, improper comments outside the courtroom was markedly increased by the use of an anonymous and partially sequestered jury, which required the jurors to be transported together to and from court and to eat lunch together as well, thereby creating additional opportunities for mischief. In short, the court never ascertained in any manner whether the defendants might have been prejudiced by the juror's actions or attitudes.

The Second and other circuit courts, while recognizing the prohibition against jurors prematurely discussing a case, defer to the trial judge's "unique position to ascertain an appropriate remedy" absent an abuse of discretion. *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004). But deference to the trial court cannot be so great that the minimal protections are not accorded to protect the defendant's Sixth Amendment right to an impartial jury. This Court should grant certiorari to provide guidance to the trial courts as to their minimal duty, when confronted with a possibly biased or impartial juror at any point during the trial, to assure the defendant's Sixth Amendment right to an impartial unbiased jury is adequately protected.

CONCLUSION

For the foregoing reasons, and those raised in the petitions submitted to this Court by Mr. Colotti's co-defendants, the Court should issue Petitioner a writ of certiorari.

Dated: New York, New York
January 28, 2010

Respectfully submitted,

LEVITT & KAIZER
40 Fulton Street, 23rd Floor
New York, New York 10038
(212) 480-4000

RICHARD WARE LEVITT (RL-9177)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: May 13, 2008 Decided: June 11, 2009)

Docket Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON).

UNITED STATES OF AMERICA,

Appellee,

– v. –

PRENKA IVEZAJ, NARDINO COLOTTI, ALEX RUDAJ, ANGELO DIPIETRO, NIKOLA DEDAJ, AND LJUSA NUCULOVIC,*

Defendants-Appellants.

Before: FEINBERG, MINER, and B.D. PARKER, *Circuit Judges*.

Defendants appeal from the judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) for racketeering, RICO conspiracy, conspiracy to conduct an illegal gambling business, and using and carrying

---

* The Clerk of Court is directed to amend the official caption as indicated.

firearms during and in relation to a crime of violence. Affirmed.

RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y., *for Defendant-Appellant Prenka Ivezaj*.

RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y., *for Defendant-Appellant Nardino Colotti*.

HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y., *for Defendant-Appellant Alex Rudaj*.

JONATHAN SVETKEY, New York, N.Y., *for Defendant-Appellant Angelo DiPietro*.

DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y., *for Defendant-Appellant Nikola Dedaj*.

JOHN BURKE, Brooklyn, N.Y., *for Defendant-Appellant Ljusa Nuculovic*.

JENNIFER G. RODGERS, Assistant U.S. Attorney (Timothy J. Treanor, Benjamin Gruenstein & Jonathan S. Kolodner, Asst. U.S. Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y., *for Appellee*.

BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (collectively "appellants" or "defendants") appeal from judgments of conviction

entered in the United States District Court for the Southern District of New York (Cote, *J.*) on charges arising from their involvement in a racketeering enterprise. We affirm the convictions for the reasons stated in this opinion and in a companion summary order.

BACKGROUND

The indictment charged, and the trial evidence, considered in the light most favorable to the government, established that the appellants were members of the Rudaj Organization (the "Organization"), a violent Albanian racketeering organization based in New York City and Westchester County. The government alleged that the Organization sought to challenge, through violence and intimidation, the primacy of the New York City area's traditional organized crime families. Gambling was a particularly active area of competition. After operating illegal gambling businesses in the Bronx and Westchester County, the Rudaj Organization forcibly took over several illegal gambling clubs in Astoria, Queens and required other bars and restaurants to install and use its gambling machines. In addition to gambling, the Organization engaged in a variety of other illegal conduct, including extortion, loansharking, and bank fraud.

These activities generated an indictment initially containing twenty-one counts, fifteen of which were ultimately presented to the jury. We address here only those relevant to our opinion. Count One charged

all of the appellants with substantive racketeering, and Count Two charged them with racketeering conspiracy. *See* 18 U.S.C. § 1962(c), (d). To establish the pattern of racketeering activity charged in Count One, the government alleged that the defendants engaged in a series of predicate acts, many of which were also charged as separate counts. Of these, Racketeering Acts Four and Five are at the center of our analysis. Racketeering Act Four alleged that Rudaj, Dedaj, Ivezaj, Nuculovic, and DiPietro attempted to extort, conspired to extort, and extorted control of an illegal gambling operation from Fotios Dimopoulos and Antonios Balampanis. Racketeering Act Five charged Rudaj, Colotti, Dedaj, Ivezaj, Nucolovic, and DiPietro with extorting and conspiring to extort the owners of a gambling business, known as "Soccer Fever," in violation of New York's extortion laws. *See* N.Y. Penal Law §§ 105.13, 155.05, 155.40. All defendants were also charged in Count Thirteen with using and carrying firearms in aid of racketeering. *See* 18 U.S.C. §§ 924(c)(1)(A)(ii) & 2.

The government's evidence included the testimony of investigating officers, various cooperating witnesses and victims, consensual tape recordings, recorded conversations from Title III interceptions, as well as physical evidence seized during various searches. At the conclusion of the trial, the district court dismissed several of the counts. The defendants were then convicted on all but one of the remaining counts (but not all of the predicate racketeering acts) and were sentenced to substantial prison terms.

The defendants appeal on various grounds. We decide here that control over illegal intangible property – here a gambling operation – is "property" that can be "delivered" under New York's extortion statute. We also conclude that Balampanis was a proper "victim" of an inchoate extortion offense under New York law; that Count One qualified as a "crime of violence" under 18 U.S.C. § 924(c); and that the district court did not err in applying a role enhancement to Ivezaj's sentence. Additionally, we decide that the admission of evidence seized from Rudaj's home, if error at all, was harmless. Accordingly, we affirm the judgments.

DISCUSSION

I. Whether Illegal Intangible Goods Qualify as "Property" under New York Extortion Law

Defendants[4] challenge their convictions on Racketeering Acts Four and Five, which alleged violations of New York's extortion laws.[5] Their main contention is that the alleged acts are legally insufficient to

---

[4] Several of the defendants simply join in the arguments of their co-defendants where there is no inconsistency between those arguments and the arguments made in their own briefs. We use the general term "defendants" to avoid confusion.

[5] State law crimes such as extortion can constitute racketeering acts under RICO. 18 U.S.C. § 1961(1)(A) includes "any act or threat involving . . . extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year" in its definition of "racketeering activity."

sustain a conviction because control over illegal gambling does not constitute "property" under New York's extortion law and, even if it did, no property was "delivered" as is required by the statute. We review *de novo* the grant or denial of a Rule 29 motion for judgment of acquittal. *United States v. Eppolito,* 543 F.3d 25, 45 (2d Cir. 2008); *United States v. Florez,* 447 F.3d 145, 154 (2d Cir. 2006).

As proof of Racketeering Act Four, the government established that the Organization, through violence and intimidation, wrested control of certain illegal gambling operations in Astoria from the Lucchese Crime Family. In June of 2001, members of the Rudaj Organization seriously assaulted Antonios Balampanis, a close companion of Fotios Dimopoulos, a Lucchese family associate who supervised their Astoria operations. Dimopoulos later told Balampanis that his beating had been intended as "a message" for Dimopoulos, and Dimopoulos never returned to gambling clubs in Astoria following the assault.

Racketeering Act Five related to the Rudaj Organization's operation of "barbut," a lucrative gambling activity in Astoria. In early August 2001, a Gambino associate, Tommy Napoli, opened a gambling club known as "Soccer Fever" that directly competed with barbut and was operated by Mikhail Hirakis. On the club's first night, Soccer Fever brought in approximately $8,000. The next night, approximately fifteen members of the Organization, including the six defendants, stormed the club with guns on the instruction of Rudaj and broke up the

game. They intended to assault Napoli, but when they were unable to locate him, they assaulted Hirakis instead. Rudaj intimidated the club's patrons: "I don't want to see nobody here. If I see [you] one more time, I swear to God . . . I beat you . . . one by one. I eat you up. . . . It's closed." That was the end of Soccer Fever, and the Organization subsequently extended its control of illegal gambling in Astoria.

Under New York law, "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [c]ause physical injury to some person in the future. . . ." N.Y Penal Law § 155.05(2)(e)(1). "Property" is defined as "any . . . personal property . . . or any article, substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1).

The district court instructed the jury that "[t]he term property includes not only money and other physical or tangible things, but also any valuable right considered as a source or element of wealth." Moreover, "[t]he pursuit of a business, including the solicitation of customers necessary to the conduct of the business, is considered property, as are the proceeds of a business." Further, the court charged that "[i]t does not matter . . . if the victim's initial acquisition or possession of tangible property was illegal, or if the business in which the victim is engaged is illegal. Illegally obtained assets and

businesses conducted in violation of the law can constitute property."

While acknowledging that an intangible good may constitute property under New York law, defendants challenge this instruction on the ground that "control over illegal gambling" does not constitute property because a legal right to the alleged property is required before it can qualify as property under New York law. They contend that because the Luccheses and the various victims had no legal right to operate an illegal gambling business, Racketeering Acts Four and Five did not sufficiently allege extortion.

We agree with the district court that an illegal gambling business can constitute property under New York law. The statute broadly defines "property" as "any . . . personal property, real property . . . substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1). Illegal intangible property, such as that contemplated here, fits within this expansive definition: control over illegal gambling is a "thing of value" which is "provided for . . . compensation."

This understanding is consistent with the New York courts' recognition that intangible property as well as illegal tangible property are covered by the statute. For example, in *People v. Garland,* 69 N.Y.2d 144, 147 (1987), the New York Court of Appeals held that intangible goods – in that case, a tenant's right to occupy an apartment – could constitute "property,"

noting that "an interest need not be transferable to constitute 'property' [under N.Y. Penal Law § 155.00(1)]." *See also People v. Spatarella,* 34 N.Y.2d 157, 162 (1974) ("property" includes intangible goods, because "[s]urely the extortionist's demand for the business itself, or a part of it, is, if anything, more egregious than the demand simply for money"); *People v. Dixson*, 798 N.Y.S.2d 659, 664 (Crim. Ct. 2005). Under New York law, illegal tangible goods can also constitute "property." *See People v. Hardwick*, 524 N.Y.S.2d 798, 800 (App. Div. 1988) ("That it was unlawful for [the victims] to possess the narcotics is no defense to the defendant's unlawful taking of them."); *People v. Izzo*, 409 N.Y.S.2d 623, 624 (Crim. Ct 1978) ("Ownership . . . is a broad concept. Even a person who has himself stolen property has a right of possession superior to that of a third person who wrongfully takes it from him. . . ."); *see generally People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698, 700 (App. Div. 1911) ("'[P]roperty'" is "intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."). Given such an expansive definition of "property," and the absence of any legality requirement in the statute, we see no indication that the New York legislature intended that illegal intangible assets could not be the subject of extortion.

Our jurisprudence interpreting the Hobbs Act also supports our analysis here. The Hobbs Act was

modeled on the New York extortion statute, and New York courts have often looked to Hobbs Act jurisprudence for guidance. *See, e.g., People v. Capparelli*, 603 N.Y.S.2d 99, 104 n.1 (Sup. Ct. 1993) (citing cases for the proposition that "New York appellate courts frequently refer to federal cases interpreting the Hobbs Act"); *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) ("Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code."). In *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), we reviewed our Hobbs Act precedents following the Supreme Court's decision in *Scheidler*, and we reaffirmed that "intangible property rights can qualify as extortable property under the Hobbs Act. . . ." 459 F.4d at 323. Moreover, we held that such rights "can qualify as extortable property under the Hobbs Act regardless of whether its exercise, transfer, or sale would be legal." *Id.* at 325. Importantly, we did not "see any basis for imposing a 'legality' requirement on the extortion of both tangible and intangible property." *Id.* at 326.

Defendants argue that even if control over an illegal gambling business could be extorted under New York law, defendants did not "obtain" this property because it was never "delivered" to them. *See* N.Y. Penal Law § 155.05(2)(e). We find this interpretation imaginative but overly literal and, in any event, not supported by the law. Under New York law, an intangible property right – which by definition

cannot be "delivered" in the traditional sense – can be extorted. *See Garland,* 69 N.Y.2d at 146-47; *Spatarella,* 34 N.Y.2d at 162 ("property" under the extortion statute includes intangible rights). For similar reasons, we reject defendants' argument that they could not have transferred or delivered control over a criminal business "in any sense that the law protects." Again, it is established under New York law that illegal goods, such as drugs or drug proceeds, which are not capable of lawful transfer, fall under the extortion statute. *See Hardwick,* 524 N.Y.S.2d at 800.

II. Whether Balampanis is a Victim of Inchoate Extortion Offenses Under New York Law

The defendants also argue that "[w]hatever the reason for Balampanis's beating, he could not be the actual or intended 'victim' of an inchoate extortion offense." New York law requires that the victim of a substantive extortion offense be an "owner" of the extorted property. Defendants focus on the use of the word "owner" in the statute, which provides that "[w]hen property is taken, obtained or withheld by one person from another person, an 'owner' thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder." N.Y. Penal Law § 155.00(5). They contend that the government's proof and the court's charge were insufficient because the "victim" of extortionate conduct must own or control the property extorted, and Balampanis did neither.

The district court rejected the defendants' arguments. On this count, in response to a jury request on this issue,[6] the court instructed the jury as follows:

> THE COURT: Racketeering Act Four charges three crimes. To find that the crime of extortion was committed, you must find that at least Foti Dimopoulos was a victim of the extortion.
>
> With respect to the crimes of attempted extortion and conspiracy to commit extortion, you must find that at least one of the two identified victims in Racketeering Act Four, Foti Dimopoulos and Tony Balampanis, was an intended victim of those crimes.
>
> You may also consider or lump together the evidence regarding both identified victims to decide whether the government has proven any one of these three charges; extortion, attempted extortion or conspiracy to commit extortion. Remember in this context that it is a crime to use force or violence against one person to obtain property from another with that second person's consent by instilling fear in that second person, as I have explained in my charge.

Given the tripartite nature of Racketeering Act Four – which alleged that several of the defendants

---

[6] The jury sent a note during deliberations asking whether "the victims, Foti Dimopoulos and Tony Balampanis, [should be] looked at individually or lumped together as victims[.]"

engaged in extortion conspiracy, substantive extortion, and attempted extortion and that "any one of which . . . constitutes the commission of Racketeering Act Four" – we find no error in the court's instructions. The district judge properly charged that Balampanis could be a victim for the attempt and conspiracy offenses. The fact that Balampanis was not actually the owner does not matter for these offenses; rather, the key inquiry for the jury in an attempted extortion charge is whether the defendants *thought* he was. *See People v. Davis,* 72 N.Y.2d 32, 36 (1988) ("[F]actual impossibility will not provide a defense to a prosecution for attempted intentional acts. . . ."); *People v. Gardner,* 144 N.Y. 119, 124-26 (1894) (factual impossibility is no defense to attempt because attempt "depends upon the mind and intent of the wrongdoer, not on the effect or result upon the person sought to be coerced"); N.Y. Penal Law § 110.10 ("If the conduct in which a person engages otherwise constitutes an attempt to commit a crime . . . , it is no defense . . . that the crime charged to have been attempted was . . . factually or legally impossible of commission. . . ."). The same is true for conspiracy; only the defendants' state of mind is relevant. *See People v. Russell,* 555 N.Y.S.2d 67, 68 (App. Div. 1990) (impossibility is not a defense to conspiracy).

Because there was ample evidence that the defendants believed Balampanis, a close associate of Dimopoulos, helped control illegal gambling in Queens – no matter whether he did or not – we

conclude that the district court did not err in denying the defendants' Rule 29 motion and charging the jury that Balampanis could be a victim of the attempt and conspiracy charges.

III. Defendants' 18 U.S.C. § 924(c) Convictions

Next, defendants challenge their firearms convictions. Under 18 U.S.C. § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is guilty of a federal crime. Count Thirteen charged the defendants with violating this provision, specifically naming Count One, the substantive racketeering charge, as the predicate crime of violence.

Defendants raise two challenges to their § 924(c) conviction. First, they challenge the district court's ruling that Count One qualifies as a "crime of violence." The district court held that the convictions fell within § 924(c), because Count One specifically charged violent predicate racketeering acts, even though a conviction under § 1962 is not necessarily a conviction for a crime of violence.

A crime of violence is an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the

offense." 18 U.S.C. § 924(c)(3)(A), (c)(3)(B). When determining whether an offense is a "crime of violence" under the statute, we employ a "categorical approach," in which "we focus on the intrinsic nature of the offense rather than on the circumstances of a particular crime." *United States v. Acosta,* 470 F.3d 132, 135 (2d Cir. 2006). In *Acosta,* we concluded that a conspiracy to "injure, oppress, threaten, or intimidate any person" in connection with exercising their constitutional rights under 18 U.S.C. § 241 was a crime of violence. We reasoned that "[s]ince applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." *Id.* at 136.

Applying this categorical approach, we first look to "the intrinsic nature" of the statute. Section 1962(c), the statutory basis for the substantive racketeering offense in Count One, provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." A pattern of racketeering activity is defined as "at least two acts of racketeering activity. . . ." 18 U.S.C. § 1961(5). *See United States v. Gotti,* 451 F.3d 133, 136-37 (2d Cir. 2006) (elaborating on how a "pattern of racketeering" may be proven).

Because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged. Applying this reasoning, we hold that where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as "crime[s] of violence" under § 924(c), a § 1962 conviction serves as a predicate for a conviction under § 924(c).[7] We thus find no error in the district court's conclusion that the charged RICO offense was a crime of violence. The underlying predicate acts, with one exception,[8] allegedly involved the use of violent means, including loansharking and violent acts of extortion; unquestionably, the conduct charged in Count One posed a "substantial risk that physical force against the person or property of another" would be used in its commission. *See* 18 U.S.C. § 924(c)(3)(A), (c)(3)(B).

---

[7] This conclusion aligns neatly with our caselaw that a RICO conspiracy can constitute a "crime of violence" under statutes that provide virtually identical definitions of that term to the definition provided in § 924(c). *See, e.g., United States v. Ciccone*, 312 F.3d 535, 541-42 (2d Cir. 2002) (holding that the charged RICO conspiracy was a crime of violence under the Bail Reform Act); *United States v. Doe*, 49 F.3d 859, 866-67 (2d Cir. 1995) (finding no error in district court's ruling that a RICO conspiracy was a crime of violence under the Juvenile Delinquency Act).

[8] The only predicate act that was not a crime of violence was one charging gambling offenses.

The defendants' second contention is that, because the violent predicates were state law offenses, their crime of violence was not one "prosecut[able] in a court of the United States" as required by § 924(c). We conclude that whether the alleged firearms conduct was premised on state or federal predicates is irrelevant, provided that the government proves, as it did here, that the § 1962 offense alleging the pattern of racketeering is a crime of violence. The jury only considered the state law predicates to determine that the defendant used firearms as charged in Count One, which, as previously discussed, is undeniably a crime "prosecut[able] in a court of the United States" and a "crime of violence" for the purposes of § 924(c).

IV. Whether Evidence from Rudaj's Home Should Have Been Suppressed

We next consider whether the district court erred in admitting evidence taken from a search of Rudaj's bedroom and walk-in closet. On an appeal from a district court's ruling on a motion to suppress evidence, we review the court's factual findings for clear error, viewing the evidence in the light most favorable to the government. The district court's legal conclusions are reviewed *de novo*. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004).

At approximately 6:30 in the morning on October 26, 2004, federal law enforcement agents knocked on Rudaj's door to execute an arrest warrant. The agents did not have a search warrant for Rudaj's home.

Rudaj answered the door unarmed and in his boxer shorts; the government accompanied him inside, purportedly to get him dressed. Rudaj told the agents that he had a loaded hunting rifle next to his bed, which they would see when they entered his bedroom. He also said that no other individuals other than his wife and children were in the home.

After handcuffing Rudaj, the agents then secured the rest of his family members on the first floor and executed what they termed a "protective sweep," which included, as one agent testified, "the bedroom in part because we have to be in the residence in order to get him dressed." Agent Gregory Massa testified that he and his partner went upstairs to the master bedroom, and after observing the rifles propped against the bed, cleared the bedroom to ensure the safety of themselves and the other agents and to confirm that no one else was there.

They first entered the walk-in closet in the master bedroom because it "posed the greater threat." They saw the barrel of a rifle above a pile of clothing and proceeded to clear that corner of the closet. Agent Massa testified that while doing so, they "noticed another weapon that was shorter, another rifle that was shorter in length, and several clear plastic bags which you could clearly see that contained gun cleaning equipment, things of that nature, all right in the same area." They also saw a green handgun case and two knives. The agents then cleared the second smaller closet and saw another bag, similar to those

seized from the walk-in closet, and a box that contained handgun holsters, a taser, and handcuffs.

The district court denied in part and granted in part Rudaj's motion to suppress the evidence taken from his home. The court first concluded that the search of his closets could not be characterized as a protective sweep incident to his arrest. Applying *Maryland v. Buie,* 494 U.S. 325 (1990), the district court found that the sweep did not involve a search "adjoining the place of arrest" nor did the agents have articulable facts regarding the presence of others posing a danger to them to justify a more far-reaching search.

Nevertheless, the court ruled that the evidence from the search of the bedroom – the two guns on either side of the night stand and the money and keys found on the dresser – was admissible. Looking to our holding in *United States v. Di Stefano,* 555 F.2d 1094, 1101 (2d Cir. 1977), in which we held that officers have a duty to find clothing when the defendant is arrested in a state of undress, the court concluded that the agents properly secured Rudaj and, in looking for his clothing in the bedroom, could seize the contraband in his bedroom that was in plain view.

The district court further ruled that the evidence from the walk-in closet was admissible as a security sweep incident to the search for Rudaj's clothing. The district court reasoned that "[t]here is every reason to find that the balance struck in *Buie* should extend to protective searches that are conducted incident to

the entry into a residence for the purpose of securing clothes for an insufficiently dressed arrestee." Therefore, because the area in the walk-in closet could potentially harbor a dangerous individual, the agents appropriately opened the closet door and observed the barrel of a handgun lying on a shelf in plain view and were therefore entitled to search the back of the closet and seize the weapon. While there, the court reasoned, they could also seize other incriminating evidence in plain view. However, the district court concluded that the evidence from the second, smaller closet was inadmissible because the objects removed from that closet – a white plastic bag and a plain cardboard box – were not "patently incriminating" because, unlike the white plastic bags properly removed from the master closet, the "the bag in the smaller closet did not reveal any incriminating contents through the transparent plastic." Thus, the agents were not justified in removing that bag from the closet to assess its contents.

We agree that the agents were permitted to enter Rudaj's bedroom to find clothing for him and seize any incriminating evidence that was in plain view. However, Rudaj also argues that the district court wrongfully expanded the scope of the "protective sweep" doctrine by admitting the evidence seized from the closets. In *United States v. Miller*, 430 F.3d 93 (2d Cir. 2005), decided after the district court's denial of Rudaj's suppression motion, we specifically held that the "protective sweep" doctrine delineated in *Buie* applies in "circumstances other than during

the in-home execution of an arrest warrant." *Miller,* 430 F.3d at 100. Similarly, we stated that protective sweeps would be justified only if the police possessed "specific, articulable facts giving rise to a reasonable inference of danger." *Id.* Rudaj argues that because the officers had no articulable reason to believe that the closets posed any danger, the district court should have suppressed all of the evidence from the closets.

We need not even resolve the question of whether *Miller* extends to the search of the closets at issue here, because we conclude that the admission of the evidence against Rudaj, if error at all, was harmless. A district court's erroneous admission of evidence is harmless "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Garcia,* 291 F.3d 127, 143 (2d Cir. 2002) (quoting *United States v. Rea,* 958 F.2d 1206, 1220 (2d Cir. 1992)). In conducting harmless error review, we consider the following factors: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan,* 490 F.3d 110, 123 (2d Cir. 2007) (quoting *Zappulla v. New York,* 391 F.3d 462, 468 (2d Cir. 2004) (internal quotation marks omitted)); *see also United States v. Garcia,* 413 F.3d 201, 217 (2d Cir. 2005).

Although the government discussed the evidence at summation, we conclude that the admission of the

evidence was harmless error. First, the government's evidence as to the issue of Rudaj's involvement in violent conduct was extensive. Several of Rudaj's recorded conversations in which he described engaging in violent extortionate conduct involving guns were heard by the jury. Additionally, multiple witnesses testified about the violent crimes that Rudaj committed in furtherance of the Organization. Thus, the evidence consisting of the rifles and ammunition seized at the scene was cumulative of the testimonial evidence regarding Rudaj's participation in violent racketeering acts. Further, it is unlikely that Rudaj was prejudiced by the government's statements. The district court instructed the jury that it could only convict Rudaj of the § 924(c) charge if it found that he had used or carried a firearm in connection with either the extortion of Dimopoulos and Balampanis or that of the Soccer Fever victims. In light of these instructions, the seized evidence from his house had little impact on Rudaj's § 924(c) conviction. Because the government adduced ample evidence to establish Rudaj's commission of the substantive RICO offense apart from the admission of the guns, we see no reason to disturb his conviction.

V. Ivezaj's Role Enhancement

Finally, Ivezaj challenges his sentence on the ground that any aggravating role enhancement the district court applied should have been based on the conduct alleged in the underlying predicate acts, rather than on his role in the RICO enterprise as a

whole. We typically review a district court's factual findings in support of a role enhancement for clear error. *See United States v. Huerta,* 371 F.3d 88, 91 (2d Cir. 2004). However, because Ivezaj's challenge requires us to make a legal determination about the applicability of the enhancement, we review the district court's determination *de novo. See United States v. Chacko,* 169 F.3d 140, 150 (2d Cir. 1999).

U.S.S.G. § 2E1.1 addresses the base offense levels for RICO offenses, requiring a base offense level of 19 or the offense level applicable to the underlying racketeering activity. Application Note 1 to the Guideline provides that:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, cmt. n.1. Because the Application Note treats each predicate act as "if [it were] contained in a separate count of conviction" for purposes of determining the offense level for the alleged racketeering activity, Ivezaj argues that the district court failed to consider his role in each charged act when applying the role enhancement.

We agree with the district court that a defendant's role adjustment is to be made on the basis of the defendant's role in the overall RICO enterprise. In *United States v. Damico,* the Seventh Circuit concluded that:

> [The Application Note] only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)" – that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as well to application of the Chapter Three adjustments.

99 F.3d 1431, 1437 (7th Cir. 1996); *accord United States v. Yeager,* 210 F.3d 1315, 1316 (11th Cir. 2000).

We find *Damico* persuasive. First, as the government contends, analyzing a defendant's role in the overall RICO enterprise makes a good deal more sense than considering his role in each underlying predicate. In the case of a § 3B1.1(b) role enhancement, it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts. For example, a defendant who served as a leader or manager of an extensive RICO enterprise should not be able to avoid a role enhancement simply because certain predicate acts involved fewer than five participants or criminal activity that was not extensive. Second, we agree that the language of the Guidelines is clear that the requirement to look at

each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments.

Therefore, we agree with the Seventh Circuit that there is "nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level . . . in the same way that it would to any other base offense level," that is, "by looking to the count of conviction . . . and all relevant conduct. . . ." *Damico,* 99 F.3d at 1437. Because there was sufficient evidence to show that Ivezaj qualified for the enhancement for his role in the overall RICO enterprise, we affirm his sentence.

CONCLUSION

For the foregoing reasons, the judgments of conviction are AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Jun. 11, 2009)

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of June, two thousand nine,

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

United States of America,

Appellee,

-v.-

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,*

Defendants-Appellants.

**Nos. 06-3112-cr (L),
06-3275-cr (CON),
06-3296-cr (CON),
06-3339-cr (CON),
06-3372-cr (CON),
06-5908-cr (CON)**

SUMMARY ORDER

FOR DEFENDANT-APPELLANT IVEZAJ: RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT COLOTTI: RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT RUDAJ: HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT DIPIETRO: JONATHAN SVETKEY, New York, N.Y.

---

* The Clerk of Court is directed to amend the official caption as indicated.

FOR DEFENDANT-APPELLANT DEDAJ:	DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT NUCULOVIC:	JOHN BURKE, Brooklyn, N.Y.
FOR APPELLEE:	JENNIFER G. RODGERS, Assistant United States Attorney (Timothy J. Treanor, Benjamin Gruenstein and Jonathan S. Kolodner, Asst. United States Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction are AFFIRMED.

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (the "defendants") appeal their judgments of conviction entered by the United States District Court for the Southern District of New York (Cote, *J.*) on racketeering and other charges. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal, as well as the opinion in this case filed separately today.

Defendants challenge the district court's refusal to discharge Juror Four. Several defense counsel moved to dismiss the juror, complaining that the juror engaged in outbursts and other behavior suggesting antagonism towards the defendants. Rather than dismiss the juror, the district court gave general instructions to the jury reminding them to keep open minds and refrain from discussing the case or sharing opinions aloud before the termination of trial. "The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion." *United States v. Perez,* 387 F.3d 201, 205 (2d Cir. 2004). Because we give trial judges broad flexibility in handling such matters, we find no abuse of discretion here.

Defendant Colotti contends that the district court erred in excusing Juror 90. Both the judge and the courtroom deputy spoke with the juror on different occasions regarding personal matters that were interfering with her ability to serve. Eventually, the juror was dismissed. We find no abuse of discretion in the manner in which the district court handled the dismissal.

Several defendants also claim that the district court erred in admitting non-testifying codefendant Nuculovic's inculpatory statements to federal agents. Before he was arrested, Nuculovic admitted that he had been involved in a criminal organization run by Colotti, Rudaj, and Dedaj. When the government informed the district court of its intention to offer his statements, the defendants moved for severance on

the grounds that the admission of the testimony would violate the Sixth Amendment's Confrontation Clause. The court instead ordered a number of redactions. The orders precluded any government witness from testifying about Nuculovic's use of the phrase "three leaders" to describe the leadership of the Rudaj Organization as such testimony would implicate Colotti, Rudaj, and Dedaj. After one of the agents testified that Nuculovic had stated that he and "three leaders" of the organization took over illegal gambling, the court recessed and reminded the parties that it had prohibited the government from referring to the "three leaders." At that point, counsel for Rudaj, Colotti, and Dedaj moved for a mistrial, which the district court denied. In response to defense counsel's desire not to call additional attention to the agent's mistake, the district court struck the statements from the record outside the presence of the jury.

We review a district court's evidentiary decisions for abuse of discretion, *see United States v. Thompson,* 528 F.3d 110, 120 (2d Cir. 2008), and find none here. The district court specifically instructed the jury prior to the agent's testimony that Nuculovic's inculpatory statements were being admitted solely against Nuculovic and that the jury was not to consider the statements against any other defendant. "Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." *United States v. Downing,* 297 F.3d 52, 59 (2d Cir. 2002). Additionally, the district

court found that the statements were sufficiently redacted so that no other defendant could be implicated by Nuculovic's admission. We believe that any prejudice stemming from the testimony was minimal and was adequately addressed by the district court's prophylactic measures. Accordingly, the defendants' challenges fail.

Rudaj and Colotti next challenge the district court's failure to dismiss one of the racketeering acts. Because the jury ultimately found that charge unproven, the defendants claim that we should conclude retroactively that the racketeering act was improperly joined because it had a prejudicial spill-over effect. "The term 'retroactive misjoinder' refers to circumstances in which the 'joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper.'" *United States v. Hamilton,* 334 F.3d 170, 181 (2d Cir. 2003) (quoting *United States v. Jones,* 16 F.3d 487, 493 (2d Cir. 1994)). "The concept of prejudicial spillover . . . requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Hamilton,* 334 F.3d at 182. Here we discern no prejudicial effect, given the overall strength of the government's case. *See id.*

Several defendants also maintain that the court did not give them sufficient time to confer with their

counsel regarding peremptory challenges. Trial courts have ample discretion to determine the procedures under which peremptory challenges are exercised, *see United States v. Thompson*, 76 F.3d 442, 451 (2d Cir. 1996), and the district court repeatedly warned defense counsel that they would have a brief period at the end of jury selection in which to consult regarding their strikes. While other procedures were available to the district judge, and the approach she took was, conservatively stated, aggressive, defendants have not demonstrated that the court abused its discretion.

Nuculovic argues that his trial counsel was constitutionally ineffective because his counsel allegedly fell asleep at various points during the trial and failed to consult with Nuculovic and call witnesses on his behalf. Nuculovic's claim is best addressed on habeas review under 28 U.S.C. § 2255, rather than on direct review, so "that the allegedly ineffective attorney . . . [is] given the opportunity to explain the conduct at issue." *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003). Consequently, we decline to address this claim now. *See Massaro v. United States*, 538 U.S. 500, 504 (2003).

Finally, several of the defendants raise challenges to the sufficiency of the evidence adduced to support their convictions. "[A] defendant raising an appellate challenge to the sufficiency of the evidence supporting a conviction faces a heavy burden, because we must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *United States v. Gaskin*, 364 F.3d 438, 459

(2d Cir. 2004) (internal quotation marks omitted). We have repeatedly established that "[r]eversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." *Id.* at 459-60. After reviewing the substantial evidence of guilt the government adduced at trial, we conclude that the defendants have not met this heavy burden.

We have considered the defendants' remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand and nine,

PRESENT:

HON. Wilfred Feinberg,
HON. Roger J. Miner,
HON. Barrington D. Parker,
Circuit Judges.

United States of America,	**JUDGMENT**
Appellee,	(Filed Jun. 11, 2009)
v.	**Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON)**
Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,*	
Defendants-Appellants.	

The appeal in the above-captioned case from a judgment of United States District Court for the Southern District of New York having been argued on

---

* The Clerk of Court is directed to amend the official caption as indicated.

the district court record and the parties' briefs. On consideration whereof,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the judgment of the District Court is AFFIRMED in accordance with the opinion of this Court.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Joy Fallek
Joy Fallek, Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand and nine,

---

United States of America,

Appellee,

v.

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,

Defendants-Appellants.

ORDER

(Filed Aug. 31, 2009)

Docket No.
06-3112-cr (L),
06-3275-cr (CON),
06-3296-cr (CON),
06-3339-cr (CON),
06-3372-cr (CON),
06-5908-cr (CON)

Appellant Nardino Colotti having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk